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# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1952

No. 342

WILLIAM R. DAVENA, JR.,
*Petitioner,*

vs.

UNITED STATES OF AMERICA,
*Respondent.*

**PETITION FOR WRIT OF CERTIORARI**
**to the United States Court of Appeals for**
**the Ninth Circuit**
**AND**
**BRIEF IN SUPPORT THEREOF.**

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**PETITION FOR WRIT OF CERTIORARI**
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**the Ninth Circuit.**

*To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:*

The petition of William R. Davena, Jr. for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit respectfully shows:

**THE INDICTMENT, SENTENCE, ETC.**

Petitioner was indicted (R. Tr. Vol. I, p. 10) for three violations of attempting to evade income taxes. (26 U.S.C. 145b.)

Count 1, charged that on or about the 15th day of March, 1945, in the Northern District of California, Southern Division, William R. Davena, Jr., late of Benicia, California, who during the calendar year 1944 was married, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1944, by filing and causing to be filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of California, at San Francisco, California, a false and fraudulent joint income tax return on behalf of himself and his said wife, wherein it was stated that their adjusted gross income for said calendar year was the sum of $3,457.00 and that the amount of tax due and owing thereon was the sum of $262.97, whereas, as he then and there well knew, their adjusted gross income for the said calendar year was the sum of $7,244.92, upon which said adjusted gross income there was owing to the United States of America an income tax of $1,206.03.

Count 2, charged that on or about the 15th day of April, 1946, in the Northern District of California, Southern Division, William R. Davena, Jr., late of Benicia, California, who during the calendar year 1945 was married, did wilfully and knowingly attempt to defeat and evade a large part of the income

tax due and owing by him and his wife to the United States of America for the calendar year 1945, by filing and causing to be filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of California, at San Francisco, California, a false and fraudulent joint income tax return on behalf of himself and his said wife, wherein it was stated that their net income for said calendar year was the sum of $2,972.87 and that the amount of tax due and owing thereon was the sum of $253.76, whereas, as he then and there well knew, their joint net income for the said calendar year was the sum of $6,328.52, upon which said net income there was owing to the United States of America an income tax of $1,085.26.

Count 3, charged that on or about the 4th day of April, 1947, in the Northern District of California, Southern Division, William R. Davena, Jr., late of Benicia, California, who during the calendar year 1946 was married, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1946, by filing and causing to be filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of California, at San Francisco, California, a false and fraudulent joint income tax return on behalf of himself and his said wife, wherein it was stated that their net income for said calendar year was the sum of $3,620.00 and that the amount of tax due and owing thereon was the sum of $240.00,

whereas, as he then and there well knew, their joint net income for the said calendar year was the sum of $14,354.88, upon which said net income there was owing to the United States of America an income tax of $3,374.96.

After trial by jury petitioner was convicted on all three counts and sentenced to thirty months' imprisonment on each count, sentences to run concurrently, and to pay a fine of $2,500.00.

At the conclusion of all the evidence petitioner moved the Court for judgments of acquittal (R. Tr. Vol. II, p. 213) which motions were denied. A motion for a new trial was made and denied (R. Tr. Vol. II, p. 234).

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**STATEMENT OF THE CASE PRESENTING THE QUESTIONS INVOLVED.**

The Government in this case called as its first witness one John H. Reedy, Deputy Collector of Internal Revenue, First District of California (R. Tr. p. 28, lines 5-11). Mr. Reedy produced the original tax returns of petitioner for the years 1943, 1944, 1945, 1946, 1947 and 1948. The 1943, 1944, 1945 and 1946 returns were introduced as Respondent's Exhibits 1, 2, 3 and 4 (R. Tr. p. 21, lines 12-15).

The second witness called by the Government was one Jerry Robinson who testified that she ran a rooming house in Benicia during the years 1944-1946 and at times on the side a house of prostitution (R. Tr. p. 33, lines 8-12). Mrs. Robinson was asked if she

had any financial transactions with the petitioner during the years 1944-1946 and in reply to this question testified that she gave the petitioner a Christmas present now and then but that it did not amount to very much (R. Tr. p. 33, lines 14-16). She further testified that she really did not know how much money she gave to the petitioner during that period of time but that it might have been three or four hundred dollars. However, she further testified that she really didn't know how much she had given the petitioner "because if I said I did I don't really remember. I may have given him $50.00 at Christmas but I don't really know". (R. Tr. p. 33, lines 22-24). Mrs. Robinson testified on cross-examination as follows:

> "Mr. Seawell. Q. You stated, Mrs. Robinson, that you gave him a Chirstmas present or two, is that correct?
>
> A. Yes, sir.
>
> Q. And that is the only occasion upon which you recall giving him any money, is that correct?
>
> A. Well, I don't really know, I may have given him a little present some other——" (R. Tr. p. 34, lines 19-25).

The witness was asked as to whether she could recall ever having given the petitioner any money other than at Christmas time as a Christmas present and she testified that the only other present she recalled giving the petitioner was on the occasion when she had had a lot to drink and the petitioner told her to go home. She did not recall the amount of money that she gave him but testified "he was kind to me so I just gave him a little present" (R. Tr.

p. 36, lines 7-12). The witness was asked how she had arrived at her estimate of having given the petitioner presents in the sum of three hundred or so dollars during the years in question and she testified as follows in that regard:

> "Mr. Seawell. Q. You have an estimate of giving him three hundred and some odd dollars. Now, how did you arrive at that figure?
>
> A. Well, I don't know, I just arrived at it because I figure three Christmasses would be 150, and then a little bit—I don't know; I said I don't know really.
>
> Q. You don't really know how much you gave him, do you?
>
> A. That is right, I don't really know how much." (R. Tr. p. 36, lines 12-19.)

> "Mr. Seawell. Q. But you base your recollection on that fact that there were three Christmasses between 1944 and 1946 and you just imagined or assumed that you gave him $50.00 each Christmas, is that correct?
>
> A. Yes, sir.
>
> Q. You have no independent recollection of doing that?
>
> A. No, I don't." (R. Tr. p. 37, lines 2-8.)

The Government then called one Frank Bernardo, who is the manager of the Bank of America at Benicia and he produced the records of the bank setting forth the amount of money the petitioner had on deposit with that bank. These records reflected that petitioner had the following sums in his savings account:

| | |
|---|---|
| December 31, 1943 | $504.08 |
| 1944 | 920.39 |
| 1945 | 929.61 |
| 1946 | 1090.05 |

and that the above figures included accrued interest (R. Tr. p. 39, lines 1-9). The witness further testified that the petitioner also had a commercial account and that the balances were as follows:

| | |
|---|---|
| December 31, 1943 | $635.60 |
| 1944 | 791.30 |
| 1945 | 1061.60 |
| 1946 | 847.42 |

(R. Tr. p. 39, lines 13-18.)

The witness also testified that the petitioner purchased a cashier's check on December 7, 1945 in the sum of $3,758.56 (R. Tr. p. 39, line 24 to p. 40, line 2).

The next witness called by the respondent was one Robert E. Arvedi, an officer of the main branch of the Bank of America at Vallejo, California. The witness testified that the petitioner opened a savings account with that bank on the 15th day of July, 1946 and that the only deposit made to that account was the initial deposit in the sum of $6,000.00 and that the balance in said account as of December 31, 1946 was $6,000.00 (R. Tr. p. 40, line 23 to p. 42, line 8).

Respondent then called Mr. Gary Rees, manager of the Solano County Title Company (R. Tr. p. 42, line 23). He testified that his records showed that the petitioner paid to his company the sum of $3,758.66 on the 8th day of December, 1945; that

this sum was received in the form of a cashier's check drawn on the Bank of America at Benicia (R. Tr. p. 43, lines 11-15).

The next witness called by respondent was a Mrs. Leonora F. Silveira (R. Tr. p. 45, line 1) who testified that she sold a house to petitioner for $4,913.00 in July of 1943 and that the petitioner made monthly payments on said purchase in the sum of $35.00 per month (R. Tr. p. 47, lines 11-20).

The next witness called by respondent was a Mrs. Mary Russold who testified that the petitioner paid to her husband $750.00 for the remodeling of certain property in the year 1945 (R. Tr. p. 48, lines 23-25) and $400.00 in 1946 (R. Tr. p. 49, lines 1-4).

The next witness called by respondent was Genevieve Bennett who testified that she had a financial transaction with petitioner either in the latter part of 1946 or the first part of 1947 (R. Tr. p. 51, lines 16-19). That the financial transaction involved the purchase of a house at 125 West J Street, Benicia, by the petitioner for $7,000.00 (R. Tr. p. 51, line 22 to p. 52, line 1).

The next witness called by respondent was E. R. Tretheway, credit manager for the Earl C. Anthony Automobile Company, San Francisco (R. Tr. p. 56, line 7) whose records reflected that on May 31, 1944 a 1942 model four-door Packard sedan was sold to the City of Benicia for the sum of $2,172.91 and that the car was delivered to the City of Benicia (R. Tr. p. 56, line 16 to p. 57, line 5). It also appears from

his testimony that the car was paid for by the petitioner but was to be used by petitioner in his official capacity as Chief of Police of Benicia (R. Tr. p. 57, line 25 to p. 58, line 12).

Next the respondent called one Frank Coronado, automobile dealer of Vallejo, California who testified that petitioner purchased a 1946 Packard Sedan, September 11, 1946 for $2,611.11 and that he received in trade a 1942 Packard automobile for which he allowed petitioner $1,268.00 credit (R. Tr. p. 59, lines 18-24). However the witness further testified that he repurchased the automobile on April 20, 1948 for the sum of $2,500.00 (R. Tr. p. 61, lines 4-7).

The next witness called by respondent was Anna G. Pine who testified that she was the City Clerk of the City of Benicia; that the City of Benicia paid the petitioner $40.00 per month plus gasoline and oil to be used by him in the operation of a Packard automobile; that the payments in the amount of $40.00 started in September, 1946 and that prior thereto the city had paid all maintenance costs for the automobile (R. Tr. p. 65, lines 3-22).

The next witness called by respondent was Donald J. Thurman, special agent of the Bureau of Internal Revenue. Mr. Thurman's testimony was in regard to statements which he had taken from the petitioner. His testimony was given over the objection of the petitioner (R. Tr. p. 73, lines 1-25). Mr. Thurman testified that he first contacted the petitioner on February 23, 1949; that he at that time questioned him in regard to his income tax returns for the years

1944, 1945 and 1946. The petitioner advised Mr. Thurman that he had received a gift and/or inheritance about three years prior thereto in the sum of $5,000.00; that this money was received in cash from his father and that this money had been left to petitioner by his mother at the time of her death (R. Tr. p. 80, lines 3-8).

The agent further testified that petitioner advised him that he had received a few gifts from one Jerry Robinson, these gifts consisting of $50.00 a couple of times (R. Tr. p. 81, line 24 to p. 82, line 3).

The agent further testified that he received an affidavit from petitioner, the same being dated the 5th day of May, 1945, which affidavit purports to state "1937 gift from mother $5,000.00". It is also to be noted at this point that there is a line drawn through this statement of petitioner. This document is Exhibit No. 8 and it is apparent from the document that an attempt had been made to delete this statement from the affidavit (R. Tr. p. 85, line 25 to p. 87, line 8).

Mr. Thurman testified that he again interviewed the petitioner on the 22nd day of July, 1949 (R. Tr. p. 87, lines 9-11) and in questioning him asked him if he would explain why he had omitted certain alleged income from his tax returns; that the petitioner at that time stated "I figured they were just handouts, a sort of a gift, I didn't know I had to pay income taxes on them. I don't know too much about it." (R. Tr. p. 89, lines 11-16).

The agent further testified that at the end of the interview on July 22, 1949 a Mr. Russold asked the petitioner "You didn't report the full amount of your income; that is, you haven't declared the gratuities for fear of apprehension from local authorities." And then he asked him was it for the purpose of evading his income taxes, and Chief Davena replied, "Absolutely not." (R. Tr. p. 89, line 24 to p. 90, line 3).

The agent further testified that at the time of his first interview with petitioner he asked the petitioner if he did not know that the payments that he had received were taxable and the petitioner replied yes that he knew the amounts were taxable because there was so much information about it in the newspapers nowadays (R. Tr. p. 90, lines 15-21).

The agent testified that the petitioner took him to the Bank of America and opened a safe deposit box which he, the petitioner, had rented and in the agent's presence, and that he, the agent, made an inventory of the items in the safe deposit box (R. Tr. p. 107, line 21 to p. 108, line 4); that the safe deposit box contained a marriage license of the petitioner, a policy of title insurance on a home, five $25.00 bonds, two $100.00 bonds; that the bonds were in the name of the children of petitioner; that there was nothing of an unusual nature in the safe deposit box (R. Tr. p. 108, line 21 to p. 109, line 19).

The agent further testified that petitioner advised him that in the year 1947 he had reported $800.00 as promotions on his income tax return and also advised him he was going to report approximately $1,900.00

as promotional income which he had received in the year 1948 (R. Tr. p. 114, lines 15-20).

The agent also testified that the petitioner advised him that he had a net worth of about $5,300.00 when he was married in 1938 (R. Tr. p. 123, lines 8-18).

The agent also was asked the following question and gave the following answer:

> "Q. Now, any place in your records, the notes that you took, or anything that you remember, at any time did Chief Davena in the conversation of February 23rd or the conversation of March 8, 1949, tell you that he had received any gifts from anyone other than the three $50.00 gifts from Jerry Robinson prior to 1947?
>
> A. No." (R. Tr. p. 130, lines 13-19.)

The agent in referring to the real estate alleged to have been purchased and paid for by the petitioner in the year 1946 for the sum of $7,000.00 testified that the transaction in question might have taken place in 1947 rather than in 1946 and that if this were so that there would necessarily be a correction in the net worth of the petitioner in the sum of $7,000.00 (R. Tr. p. 141, lines 6-18). The agent further testified that of course it was possible that the petitioner could have received the $7,000.00 and/or $7,150.00 which was paid on the property in 1947 by borrowing the money or in many other different ways (R. Tr. p. 142, lines 1-13).

The agent also testified that he received a letter from Harold M. Simon, attorney for petitioner, some time after December 7, 1949 calling his attention to

the fact that the petitioner had made several errors in his statement to the agent and wished to correct them. The agent testified that after receiving said letter that he did not communicate with anyone in regard to the errors and did not make the corrections called to his attention (R. Tr. p. 153, line 21 to p. 154, line 3).

The next witness called by the respondent was Robert W. Davis, Deputy Collector of Internal Revenue, First District of California (R. Tr. p. 162, lines 11-17). He testified that he had a conversation with the petitioner on or about the 24th day of October, 1949 (R. Tr. p. 163, lines 1-3); that at that time petitioner stated that he wished to cooperate with the Department of Internal Revenue in any way possible and that he had done so up until that time. The agent testified that the petitioner had cooperated with his department and that he, the petitioner, stated "he wanted to do what was right, and he stated that if he had known these returns, these income tax returns, were strictly confidential, that he would have reported this outside income he had been receiving." (R. Tr. p. 164, lines 9-14).

The agent further testified that he had made some investigation of the petitioner's charge accounts in various stores in Oakland and Vallejo (R. Tr. p. 163, lines 4-25), but that he did not attempt to ascertain what indebtedness the petitioner had in stores other than those referred to above.

The next witness called by the respondent was Augustus V. Brady, Technical Adviser with the Penal

Division, the Chief Counsellor's office of the Bureau of Internal Revenue, San Francisco (R. Tr. p. 178, lines 18-24). He testified that he had made a number of computations at the request of the respondent; that these computations were based on hypothetical questions which were submitted to him by the respondent. The witness made a number of computations for both the petitioner and respondent. One of the computations made for the respondent assumed that certain electric trains had a value of $500.00 as of December 31, 1943. Another computation made for the petitioner assumed that the trains had a value of $1500.00, as of December 31, 1943 (R. Tr. p. 203, lines 7-23). The witness then at the request of the petitioner computed the amount of tax which the petitioner would owe for the years 1944, 1945 and 1946 assuming that he had filed a separate return and assuming that the trains in question had a value of $1,500.00 as of December 31, 1943 and that petitioner did not purchase a house in 1946 for $7,150.00 but rather purchased the house in the year 1947. The witness testified that the amount of tax due the respondent would have been $485.00 for the year 1944; $432.00 for the year 1945; and $1,297.22 for the year 1946 (R. Tr. p. 225, line 13 to p. 226, line 8).

The agent was asked the following questions and gave the following answers in regard to the total deficiency of the petitioner assuming he had filed a separate return:

> "Mr. Maxwell. I will withdraw the question, Mr. Brady. Would the difference on a separate return basis be substantial?

A. There would be a deficiency in any event.
Q. There would be a deficiency in any event?
A. Yes." (R. Tr. p. 229, lines 12-16.)

The witness further testified in regard to this subject as follows:

"Mr. Seawell. Q. And by a deficiency in any event you mean a dollar or two dollars, or what do you mean?
A. Well, no—I mean it would be a deficiency of, say, several hundred dollars.
Q. Well, it would be much lower than these figures on the blackboard he has just put on?
A. Well, they would be, yes.
Q. Well, let me have those figures.
A. Well, if I can just have—(The witness computes figures).
The Witness. O.K. For 1944, $266.52.
Mr. Seawell. $266 and how much?
A. Fifty two cents.
Q. What is that?
A. That is the deficiency in tax, based on separate computation rather than joint computation.
Q. And you are using the figures in Government's Exhibit 9, is that correct?
A. That is correct.
Mr. Maxwell. Just a moment. You are using what figures?
A. I am using the figures before correction.
Mr. Maxwell. Before correction?
Mr. Seawell. You are using these totals here (indicating), aren't you?
A. Yes, $23,000—before the corrections.
Q. Yes, that is right.

A. You want the rest of that answer, Mr. Seawell? 1945?

Q. Yes.

A. $126.12. 1946, $296.00.

Q. The total deficiencies for all the years involved in this case, then, would be $688.64, is that correct?

A. I wouldn't say that. Based on the assumption you gave me, yes.

Q. Yes, based on the question, the hypothetical question, that is what you are testifying to as an expert, isn't that right?

A. Based on your hypothetical question.

Q. Now, let's get back to this. This includes some other person besides the defendant's tax, is that correct, or do you lead this jury to believe that is what the defendant would owe?

A. That would be the joint returns of husband and wife.

Q. That would be for both of them?

A. Yes.

Q. So he personally owed half of that?

A. Well, if they filed joint returns. They made an election to file that way. He would be liable jointly and severally for that tax.

Q. But the defendant in this case owed half of that? That would be his part of it, so to speak, would it not?

A. No, I think not. Community property is based—the husband has control of the community property. Wouldn't he be liable for the wife's liabilities?

Q. Under certain circumstances, and you can will—his Honor will tell you—upon the death of one you can will part of the property away and not the other part.

A. But I feel on the joint return that would be the amount of tax due and owing.

Q. But at any event these figures would be correct under the question presented to you, is that correct?

A. To the best of my ability." (R. Tr. p. 229, line 19 to p. 232, line 3.)

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## JURISDICTIONAL STATEMENT.

**1. Jurisdiction of the Court.**

The jurisdiction of this Court is invoked under Title 28 U.S.C. sec. 1254(1).

**2. The decision and judgment of the Court of Appeals.**

The decision and judgment of the Court of Appeals was rendered on June 27, 1952 (R. Tr. Vol. I, p. 22).

Petition for rehearing denied on August 18, 1952 (R. Tr. Vol. I, p. 26).

**3. Basis upon which it is contended the Supreme Court has jurisdiction and cases in support thereof.**

(a) The Court of Appeals' decision that the extra-judicial statements of the petitioner were properly admitted into evidence is in direct conflict with the holding in the case of *Fenwick v. United States,* 177 Fed. (2d) 488 (Cir. 7). Under such circumstances, this Court has jurisdiction to review the action of the lower Court on certiorari (*Dept. of Treasury v. Ingram-Richardson Mfg. Co.,* 313 U.S. 252, 85 L. ed. 1313, Rule 38 of the Supreme Court, Par. 5b).

(b) The decision of the Court of Appeals holding that the testimony of one witness that she had given

petitioner 300-400 dollars for favors was not sufficient evidence for that Court to hold that it was proper to introduce the extrajudicial statements of petitioner in view of the further testimony of said witness (Jerry Robinson) which is set forth under the heading of "Statement of the Case Presenting the Questions Involved".

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**THE QUESTIONS PRESENTED.**

The questions presented and raised by this petition are as follows:

1. Must the respondent prove by competent evidence beyond a reasonable doubt that petitioner received substantial income during the years in question which he did not report before the respondent is allowed to introduce the extrajudicial statement of the petitioner?

2. Is the burden of proof in a net worth case on respondent to clearly and accurately establish by competent evidence the petitioner's net worth as of January 1, 1944 (the starting point of respondent's case)?

3. Is it incumbent upon the respondent to produce evidence (in a net worth case) that excludes all possible available sources of taxable income from which the increased net worth and the excess expenditures could have been derived.

**POINTS RELIED UPON FOR THE ISSUANCE OF A WRIT OF CERTIORARI.**

The writ of certiorari prayed for herein should issue for each and all of the following reasons:

1. The Court of Appeals has stated that it would not follow the holding in the case of *Fenwick v. United States,* supra. By so holding the Court of Appeals has done away with the rule that the uncorroborated extrajudicial statements of a defendant are not admissible as evidence.

2. The Court of Appeals has held in effect that the corpus delicti could be established by extrajudicial declarations, confessions or admissions of a defendant contrary to the holding in *Pines v. United States,* 123 Fed. (2d) 825 (Cir. 8), *Gulotta v. United States,* 113 Fed. (2d) 683 (Cir. 8).

3. The Court of Appeals has also held that the amount of the alleged evasion of taxes need not be substantial in order to support a verdict of guilt.

Wherefore, petitioner respectfully submits that this Honorable Court issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit, to the end that the questions involved may be fully presented and argued and justice done in the premises.

Dated, Sacramento, California,
September 15, 1952.

Respectfully submitted,
A. M. MULL, JR.,
*Attorney for Petitioner.*

CERTIFICATE OF COUNSEL.

I hereby certify that I am a member of the bar of the Supreme Court of the United States and that I am counsel for the petitioner in the above entitled cause and that, in my judgment, the foregoing petition is well founded in point of law as well as in fact and that said petition is not interposed for delay.

Dated, Sacramento, California,
September 15, 1952.

A. M. MULL, JR.,
*Attorney for Petitioner.*

# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1952

No.

WILLIAM R. DAVENA, JR.,
*Petitioner,*
vs.
UNITED STATES OF AMERICA,
*Respondent.*

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

### THE OPINIONS AND JUDGMENTS OF THE COURTS BELOW.

The judgment of the trial Court was rendered and filed on July 13, 1951 (R. Tr. Vol. I, p. 8).

The decision and judgment of the Court of Appeals was rendered and filed on June 27, 1952 (R. Tr. Vol. I, p. 25).

Petition for rehearing denied on August 18, 1952 (R. Tr. Vol. I, p. 26).

**JURISDICTION.**

The jurisdiction of this Court is invoked under Title 28 U.S.C., Section 1254(1).

The basis on which it is contended this Court has jurisdiction and cases in support thereof are fully set forth under the heading "Jurisdictional Statement".

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**STATEMENT OF THE CASE.**

Petitioner was indicted (R. Tr. Vol. I, pp. 1-13) for three violations of attempting to evade income taxes (26 U.S.C. 145b; Sec. 145b, Internal Revenue Code). Counts 1, 2 and 3 charged that petitioner, a married man, in 1945, 1946 and 1947 filed a false and fraudulent income tax return for the calendar years 1944, 1945 and 1946.

A full statement of the case is set forth in the foregoing petition under the heading "Statement of the Case Presenting the Questions Involved".

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**SPECIFICATION OF ERRORS RELIED UPON.**

1. The opinion of the Court of Appeals is in error in holding that the extrajudicial statements of petitioner were properly admitted into evidence and in effect overruling the case of *Fenwick v. United States*, supra.

2. The opinion of the Court of Appeals is in error in holding that the corpus delicti could be estalished

by extrajudicial declarations, confessions or admissions of the petitioner.

3. The opinion of the Court of Appeals is in error in holding that the burden of proof in a net worth case is not on respondent to clearly and accurately establish by competent evidence the petitioner's net worth as of January 1, 1944.

4. The opinion of the Court of Appeals, is in error in holding that it is not incumbent upon the respondent to produce evidence that excludes all possible available sources of taxable income from which the increased net worth and the excess expenditures could have been derived.

5. The opinion of the Court of Appeals is in error in holding that there was a substantial understatement of petitioner's income (relying simply upon the testimony of one witness that she (Jerry Robinson) had given petitioner 300-400 dollars for favors).

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## ARGUMENT.

From a reading of the testimony in its entirety in this case it can readily be seen that the respondent attempted to prove that the petitioner failed to report all of his taxable income by what is known as the net worth theory. That is, the respondent attempted to establish the petitioner's net worth as of December 31, 1943 and then to establish his net worth at the end of the years 1944, 1945 and 1946. Respondent then

subtracted the total of petitioner's net worth from the amount of income reported for the years in question and thus attempted to arrive at his taxable income. The respondent did not take into account the fact that petitioner had a net worth of some $5,300.00 at the time of his marriage in 1938 nor did it take into account the fact that he had received a gift in the sum of $5,000.00 from his mother, some three or four years prior to the start of the investigation of this case. The respondent has also attempted to reduce the net worth of the petitioner by one thousand dollars by valuing the electric trains in question in this case at $500.00 whereas petitioner had told it that they were worth some $1,500.00 on December 31, 1943. Respondent also in its computations disregarded the fact that the petitioner had received a gift of $5,000.00 from his mother. Assuming this to be true this would of course reduce the petitioner's net worth so far as taxable income is concerned by that amount.

It will also be noted at this time that the respondent's original computations made by its agent, Mr. Brady, also assume that the petitioner had paid some $7,150.00 for his home and that said payment was made in the year 1946 whereas the evidence developed that the payment was not made until January 7 of 1947. This of course would again reduce the net worth of the petitioner for the year 1946 by that amount. The original computation of agent Brady made for the respondent was also based on the fact that the petitioner filed a joint return. It is to be noted that

the testimony in this case established that the petitioner was married during the years in question and that if he so desired he could have filed a separate return and that if he had done so and been given credit for the corrections which should have been made, his total tax due the respondent for the three years in question would have been $344.32, that is it would have been one-half of the $688.64 which agent Brady testified would have been the total deficiency for his wife and himself for the three years in question (R. Tr. p. 229, line 19 to p. 232, line 3). In other words the amount of the deficiency would certainly not have been substantial and therefore would not have supported a conviction in this case. It is well established that respondent must prove that a substantial portion of the tax which it alleges to be due the Government was knowingly and wilfully defeated and vaded by the petitioner.

*Gleckman v. U.S.*, 85 Fed. (2d) 394;
*Tinkoff v. U.S.*, 86 Fed. (2d) 868.

The only witness that the respondent called to testify that certain payments were made to the petitioner that were not reported by the petitioner was one Jerry Robinson. Her testimony was simply to the effect that she had given the petitioner a Christmas present or two (R. Tr. p. 34, lines 19-25); that she had no independent recollection of the amount of money that she gave to the petitioner as a present but she just imagined or assumed that she had given petitioner approximately $50.00 as a Christmas present in each

of the three years in question (R. Tr. p. 36, lines 12-19; p. 37, lines 2-8). Mrs. Robinson also testified that she might have given the petitioner a small present on one occasion when she had been drinking and he had befriended her. It is from the testimony of this one witness that the respondent has tried to establish that the petitioner received substantial amounts of income which he did not report during the years in question. A reading of the testimony of the witness Robinson in its entirety we submit would lead any reasonable person to the conclusions that she did not give any large or substantial sums to the petitioner and secondly any sums that she gave to the petitioner were given not for any particular service performed by the petitioner but simply given in the nature of Christmas presents which were so small that she, as a matter of fact, had no independent recollection of the amounts she gave petitioner. We submit that the respondent is attempting in this case to convict the petitioner not because he had received any subsantial income which he did not report but simply because he had received a Christmas present from a person who at one time was a prostitute.

We further submit that the testimony of the witness Robinson should be disregarded in its entirety as her testimony was contradictory throughout and for the further reason that she testified positively that she had no independent recollection of giving the petitioner any sums of money (R. Tr. p. 37, lines 2-8).

The only testimony of any consequence against the petitioner in this case was that of the internal revenue agents, Thurman and Davis. This testimony was introduced over the objection of the petitioner. We submit that the facts and circumstances surrounding the conviction of the petitioner in this case fall squarely within the rule applying to net worth cases as set forth in the case of *U.S. v. Fenwick*, C.C.A. 7 Circuit, Nov. 4, 1949, 177 Fed. (2d) 488. In the *Fenwick* case one Helen J. Fenwick was convicted in the United States District Court, Southern District of Indiana, of income tax evasion for the years 1943 and 1944. At the trial the Government offered no evidence other than a "net worth-expenditures" balance sheet to show the evasion of income taxes. The Court says, pages 489 and 490:

> "(1, 2) In such a situation we must keep in mind that the conviction can not stand unless there is proof of the corpus delicti, existence of which can not be presumed or established by any extrajudicial admission. The government must, by competent evidence, prove beyond reasonable doubt that the crime charged has actually been committed. Pines v. United States, 8 Cir., 123 F. 2d 825, 829; Forte v. United States, 69 App. D.C. 111, 94 F. 2d 236, 243, 127 A.L.R. 1120; Gordiner v. United States, 9 Cir., 261 F. 910, 912; United States v. Chapman, 7 Cir., 168 F. 2d 997 at page 1001. In the latter case we said: 'Appellant contends that, "In a 'net worth case,' the starting point must be based upon a solid foundation and a Revenue Agent's statement of the defendant's

> oral admission or confession when uncorroborated is not sufficient to convict." We fully agree with his statement of the law.' In other words to justify the conviction, there must be proof beyond reasonable doubt and exclusive of any express or implied extrajudicial admission by defendant, that defendant evaded some income tax. Gleckman v. United States, 8 Cir., 80 F. 2d 394, 399; United States v. Miro, 2 Cir., 60 F. 2d 58, 61; O'Brien v. United States, 7 Cir., 51 F. 2d 193, 196. Inasmuch as there is no direct proof that defendant received income which he did not report, we must test the validity of his conviction by the rules enunciated in the cases cited to determine whether there is such proof of increase in net worth, irrespective of defendant's implied admissions out of court, as to justify a finding of guilt. Such proof, circumstantial in character, in view of the principles announced, must be such as will exclude every reasonable hypothesis except that of guilt. Evidence of mere probability of guilt, of course, is not sufficient."

The Court then proceeded to review the evidence in that case and showed that the Government's information as to beginning net worth was based entirely upon an examination of defendant's "cancelled checks, bank statements and miscellaneous memoranda". The Court says, on pages 490 and 491:

> "(3) The weakness of the government's position, stressed by defendant, is the uncertainty of the propriety of the finding of defendant's net worth at the beginning of 1943. Of course, before

the increased net worth method of proof is effective, the net worth of the taxpayer at the beginning of the tax year must be clearly and accurately established by competent evidence. Bryan v. United States, 5 Cir., 175 F. 2d 223; United States v. Chapman, 7 Cir., 168 F. 2d 997, 1001; United States v. Skidmore, 7 Cir., 123 F. 2d 604, 608. By this rule we must test the sufficiency of the evidence offered by the government to establish defendant's net worth at the beginning of 1943.

* * * * * * *

"* * * the evidence falls far short of proof that the property which the government agents assumed constituted all of defendant's net worth at the beginning of 1943, was in fact all of the property then owned by him. * * *

"(4) As we have said, when the government relies upon the circumstances of increased net worth and expenditures in excess of reported income to establish income tax evasion it must produce evidence that excludes all possible available sources of taxable income from which the increased net worth and the excess expenditures could have been derived. Thus in Bryan v. United States, 5 Cir., 175 F. 2d 223, 225, the court said: 'The net worth expenditures method of establishing net income, sought to be applied in this case, is effective only if the computations of net worth at the beginning and at the end of the questioned periods can reasonably be accepted as accurate. Since * * * no claim of evasion is based upon the deductions from gross income reported by the Defendant, and since there is no evidence that

the gross expenditures by the Defendant in any year were made entirely from gross income of the business operations in such year, it was essential for the Government to present evidence that excluded, or tended to exclude, all other available sources from which the additional funds expended could have been derived. If the Defendant correctly reported his gross income, then a very substantial part of the expenditures was obliged to have been made from funds other than such current income and from sources not covered by the returns or the records of the Defendant or included by the Government's computation of net worth. * * * the Government must rely almost entirely upon circumstantial evidence, that is to say, upon the circumstance of the expenditure of considerably more money in the years in question than the Defendant took in * * *. The evidence, being circumstantial, must exclude every reasonable hypothesis other than the guilt of the defendant. * * * the case should not have been submitted to the jury since it did not exclude the hypothesis that the funds used in making some of the expenditures might have been from sources other than current business income.' This supports the decision of this court in United States v. Chapman, 7 Cir., 168 F. 2d 997, 1001."

In this case, agent Brady proceeded to go right down the list of all assets and liabilities stated in his balance sheet, and excepting where the petitioner had stipulated to facts, the figures were based wholly upon hearsay.

In *United States v. Fenwick* (C.C.A. 7th Cir., Nov. 4, 1949), 177 F. (2d) 488, discussed supra, the Court further said on page 492:

> "Remembering that the government has the burden of proof in a criminal case, that the burden never shifts to defendant, that circumstantial evidence must be of such character as to exclude every reasonably hypothesis except that of guilt, it necessarily follows that, when the government relies upon circumstances of increased net worth and expenditures in excess of reported income to establish income tax evasion, the basic net worth must be established. The defendant is not compelled to take the witness stand; he is not compelled to make proof that he is innocent, but he must be proved guilty by the evidence beyond all reasonable doubt, and where there is uncertainty as to whether all the assets of defendant are included in the government's computation of net worth, it follows that its computations can not be relied on. Essential proof of no other assets is the cornerstone of the evidence of the government; that cornerstone being faulty, the whole edifice is so weakened as to be undependable as proof of guilt beyond all reasonable doubt."

It is also to be noted that the record in this case does not indicate that the respondent attempted to or did prove that the petitioner's books were inadequate. The records disclose that the petitioner kept all records that a man in his position, to-wit, chief of police, would ordinarily keep, that is his bank accounts and a record of any financial dealings which he might have entered into such as purchase of an automobile or a

home. The Court instructed the jury in this regard as follows:

> "The income tax law provides that the net income of the taxpayer shall be computed upon the basis of the taxpayer's annual accounting period, in accordance with the method of accounting regularly employed in keeping the books of the taxpayer; but if no such method of accounting has been employed or if the method employed does not clearly reflect the income, a computation shall be made upon such basis and in such manner as, in the opinion of the Commissioner, does fairly reflect the income.
>
> The Government is authorized by law, when the books are found to be inadequate, to adopt a reasonable method of ascertaining income. And so in this case it has undertaken to find out what the defendant was worth at the beginning of the year and what he was worth at the end of the year, so as to show what he had accumulated as income in the meantime.
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> If, at the end of the year, a man has in his possession more property than he had at the beginning of the year, it goes without saying that he got it from some place; and, unless he got it by gift or inheritance or loan, it would seem that he got it by earning it, and that it was part of his income.
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> Charge of the Court in United States v. Flaccomio, D. D. Md."

We submit that the respondent did not establish that the books of the petitioner were so inadequate that they were unable to determine his net income and

for that reason the respondent was not entitled to rely upon the net worth theory. It is obvious that if the respondent had evidence to the effect that the petitioner's income was substantially greater than that reported that it would have subpoenaed the records and all the persons who had contributed to his income. This it failed to do.

The corpus delicti had not been established at the time of the admission of the extrajudicial statements of petitioner. The Court of Appeals has in effect held that the corpus delicti was established in this case by the testimony of Jerry Robinson. We submit that the corpus delicti was not proven by her testimony nor did her testimony tend to establish the corpus delicti as she was unable to testify positively that she gave the petitioner any money for services rendered and further she could not definitely testify with any exactness that she gave the petitioner any sums of money in any of the years in question. In the case of *Pines v. United States,* supra, in holding the corpus delicti had not been established the Court states as follows:

> "This, being the corpus delicti, could not be presumed, nor could it be established by extra-judicial declaration, confession or admission of the defendant. Tingle v. United States, 8 Cir., 38 F. 2d 573; Ryan v. United States, 8 Cir., 99 F. 2d 864; Gulotta v. United States, 8 Cir., 113 F. 2d 683. The evidence shows that defendant admitted to peace officers that he had possession of the securities in Minneapolis in November, 1939, and that he borrowed an automobile from a Minneapolis party. It appears from the evidence that

he had the automobile and the securities in his possession in Council Bluffs, Iowa, in November, 1939. Had there been evidence independent of defendant's admission that he had possession of these securities in Minneapolis, this would have been sufficient corroborative evidence that he transported or caused to be transported the instruments from Minneapolis to Council Bluffs. Bruce v. United States, 8 Cir., 73 F. 2d 972; Bennett v. United States, 70 App. D.C. 76, 104 F. 2d 209. There was here, however, no evidence save his own admission that he had possession of these securities in Minneapolis, Minnesota, and there is therefore lacking a vital link in the chain of circumstances by which it is sought to establish the transportation in interstate commerce. The corpus delicti includes not only the body or substance of the crime, but also the criminal means by which it was committed. The corroboration is not sufficient if it tends only to support the admission. It must embrace substantial evidence of the corpus delicti, though it need not in itself be sufficient proof of guilt. Forte v. United States, 68 App. D.C. 111, 94 F. 2d 236, 244, 127 A.L.R. 1120; Gulotta v. United States, supra."

In *Gulotta v. United States* (C.C.A. 8th Cir., July 24, 1940), 113 F. (2d) 683, the defendant was convicted of falsely swearing that he was a citizen of the United States. A conviction was based upon an affidavit of registration in which the defendant swore that he had been born in Louisiana in 1896 and was a citizen and also a written statement by the defendant before an agent of the Government in which he

declared that he had been born in Italy in March 1896 of Italian parents and in which he also admitted that he fraudulently represented himself to be a citizen of the United States. The Court held, on page 685, that extrajudicial admissions or confessions were not sufficient to authorize a conviction of crime unless corroborated by independent evidence of the corpus delicti (citing cases); that independent evidence need not be of itself sufficient proof of guilt but need only be a substantial showing which together with the admission establishes guilt beyond a reasonable doubt. The Court goes on to say, page 686:

> "But the rule requires some such independent evidence, and it is conceded by the government that the record is barren of all such extrinsic evidence in this case, unless a distinction be made between confessions and admissions."

In *Nicola v. United States* (C.C.A. 3d Cir., Aug. 9, 1934), 72 F. (2d) 780, the defendant was convicted of income tax evasion. A corporation mostly owned by the defendant had sold certain patents to another corporation, and a third corporation, the Point Improvement Company, of which the defendant was president, had been paid a commission on this sale. The commission was returned by the Point Improvement Company as income and an income tax paid thereon. The tax payable by Nicola would have been higher and it was the contention of the Government that the defendant had falsely and fraudulently used the device of the corporation to save the difference between the higher and the lower return. The cir-

cumstantial evidence upon which the case was permitted to go to the jury in the *Nicola* case was not dissimilar to the circumstantial evidence upon which the prosecution relies in this case. In reversing the verdict and judgment of conviction and holding that the evidence was insufficient to justify a conviction, the Circuit Court of Appeals, said, on page 786:

> " 'Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused; and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment of conviction.' Union Pacific Coal Co. v. United States, 173 F. 737, 740 (C.C.A. 8); Wiener v. United States, 282 F. 799, 801 (C.C.A. 3); Yusem v. United States, 8 F. (2d) 6 (C.C.A. 3); Ridenous v. United States, 14 F. (2d) 888 (C.C.A. 3)."

It is clear from a reading of the Court of Appeals' opinion in this case that there is a conflict in the decisions of the various circuit courts of appeals. As a matter of fact the respondent in its reply brief which was filed with the United States Court of Appeals in this case recognizes this fact. The respondent quoted the following language from the *Fenwick v. United States,* supra, case:

> "* * * the conviction cannot stand unless there is proof of the corpus delicti, existence of which cannot be presumed or established by an extra-judicial admission. The government must, by competent evidence, prove beyond reasonable doubt that the crime charged has actually been

committed. * * * In other words to justify the conviction, there must be proof beyond reasonable doubt and exclusive of any express or implied extrajudicial admission by defendant, that defendant evaded some income tax. Gleckman v. United States, 8 Cir., 80 F. 2d 394, 399; United States v. Miro, 2 Cir., 60 F. 2d 58, 61; O'Brien v. United States, 7 Cir., 51 F. 2d 193, 196. *Inasmuch as there is no direct proof that defendant received income which he did not report*, we must test the validity of his conviction by the rules enunciated in the cases cited to determine whether there is such proof of increase in net worth, irrespective of defendant's implied admissions out of court, as to justify a finding of guilt. Such proof, circumstantial in character, in view of the principles announced, must be such as will exclude every reasonable hypothesis except that of guilt." (Italics supplied.)

and then stated as follows:

"It is submitted that the above proposition of law is not supported by the authorities cited and should not be followed by this court. As was stated by the court in the case of Bell v. United States, 185 F. (2d) 302, 309 (C.A. 4th):

'The defendant relies principally upon Bryan v. U.S., 5 Cir., 175 F. 2d 223, and U.S. v. Fenwick, 7 Cir., 177 F. 2d 488, in both of which it was held that evidence based on the net worth theory was insufficient to support a conviction of attempting fraudulently to evade the income tax, since the government's case did not exclude the reasonable possibility that the defendant had other assets at the beginning of the period than those shown by the gov-

ernment's statement; and the court directed a verdict saying that the evidence, being circumstantial, must exclude every reasonable hypothesis except that of the defendant's guilt. But we cannot follow these decisions since it is obvious that they are based upon their particular facts and they do not relieve us from the duty of appraising the sufficiency of the evidence in the case before us. *That responsibility does not include a finding as to whether the defendant is guilty beyond a reasonable doubt.'* (Italics supplied.)

"The Fenwick case, 177 F. (2d) 488 (C.A. 7th), in holding that the Government must establish proof of specific unreported income as a prerequisite to the use of a net worth method of proof of unreported income or, in the alternative, to prove a negative or to refute all possible speculation as to the source of appellant's funds asserted by the Government to prove appellant's net worth, departs from a well established line of authority both prior and subsequent to the decision in that case.

Gariepy v. United States, 189 F. (2d) 459, 463 (C.A. 6th);

Bell v. United States, 185 F. (2d) 302, 308 (C.A. 4th);

Jelaza v. United States, 179 F. (2d) 202, 204 (C.A. 4th);

United States v. Hornstein, 176 F. (2d) 217, 220 (C.A. 7th);

Schuermann v. United States, 174 F. (2d) 397, 399 (C.A. 8th)."

The Circuit Court of Appeals in its decision in this case also recognized the conflict in the cases in

the various Circuits as it recognizes the fact that the *Fenwick v. United States* case, supra, appears to be in conflict with *Hornstein v. United States,* 176 F. (2d) 717 (Cir. 7) and *U. S. v. Yeoman-Henderson, Inc.,* 193 F. (2d) 867 (Cir. 7).

We respectfully submit that this petition should be granted for the following reasons:

1. That there is no substantial evidence in the record in this case (if petitioner's statement is excluded) from which a court or jury could find or infer that petitioner had received substantial income in excess of that which he reported in his income tax returns for years 1944, 1945 and 1946.

2. We submit that the respondent did not bring its case within the net worth theory for the reason that it did not establish a solid net worth beginning nor did it produce evidence that excluded all possible available sources of taxable income from which the increased net worth and the excess expenditures (if any) could have been derived.

3. We submit that there is a distinct conflict in the decisions of the various Circuit Courts of Appeals throughout the United States regarding the questions presented by this petition.

Dated, Sacramento, California,
September 15, 1952.

Respectfully submitted,
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